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# VIRGINIA LAW REGISTER.

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## THE JUDGES TUCKER OF THE COURT OF APPEALS OF VIRGINIA.

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ST. GEORGE TUCKER, LL. D.

St. George Tucker was born in the Island of Bermuda June 29th, O. S. 1752. His father was Henry Tucker and his mother Anne Butterfield. His brother, Henry Tucker, went to England to be educated, while St. George and Thomas Tudor Tucker, an elder brother, came to the New World.

Henry Tucker, the brother, settled in England. His son, Henry St. George Tucker, distinguished himself by his services in the East India Company, of which he was chairman during the Peel ministry, and was held in high esteem by Sir Robert Peel and the statesmen of that period. His daughter, lately deceased, was A. L. O. E. (A Lady of England), whose piety and zeal in the mission work in India, and whose hymns and other writings have given her a name worthy of remembrance in the Christian church.

Dr. Thomas Tudor Tucker settled in South Carolina. He was a prominent member of the Congress of the Confederation, and also of the first two Congresses under the Constitution of the United States, in the House of Representatives. Mr. Jefferson, in 1801, appointed him Treasurer of the United States, which office he held with unsullied integrity until his death in 1828.

St. George Tucker was the junior brother, and came to Virginia about 1770, and took an academic course of study at William and Mary College, and afterwards a course of law in the same institution. He came to the bar at once, settling in Williamsburg. He was an enthusiastic friend of the Revolutionary cause, and imbibed an early devotion to the principles of liberty and to republican government,

which he defended and expounded during the whole of his after life, with sword, pen, and tongue.

When hostilities broke out between the mother country and the Colonies, he left the bar and conducted a secret and successful expedition to Bermuda, his native island, where he knew there was a large quantity of military stores in a fortification, slenderly garrisoned. These stores he captured and brought home, and they served to eke out the scanty supply of Washington's army in the siege of Boston. The scheme was boldly conceived and bravely executed, and family tradition says he narrowly escaped with his life.

When Cornwallis invaded North Carolina, Mr. Tucker, as colonel of the Chesterfield militia, in which county he then resided, joined Greene's army, and distinguished himself very highly by his courage and conduct at the battle of Guilford Courthouse.

Afterwards, as lieutenant-colonel of a troop of horse at Yorktown, he took an active part in the siege of that place, and was slightly wounded by the explosion of a bomb. In 1837 the writer heard from "Daddy Syphax," who was his servant on that occasion, a characteristic account of Cornwallis' flag of truce asking for a "*cessation* [cessation] of hostilities," and also of the circumstances of the surrender. When I saw my narrator he was over a hundred years old, and his story was told with negro animation. It had all the marks of truth, and showed him to have been an eye-witness.

Mr. Tucker, in 1778, married the widow of John Randolph, of Matoax, Chesterfield county, Virginia, the mother by her first marriage of John Randolph of Roanoke, and of two other sons. She was reputed, in the words of another, to have been a lady of "exquisite accomplishments, whose tastes and sentiments corresponded with those of her husband, and mutual affection blessed their union."

The venerable Daniel Call says: "After the peace, the prospect of a growing family induced him once more to enter on the practice of law in the county courts, where he soon arrived to eminence, and was second to none of his competitors; but in a few years he left that theatre, and attended the Superior courts with considerable reputation, respected by all the court and bar, and beloved of Innis and Marshall."

After the death of his beloved wife, in 1788, he returned to Williamsburg. In January, 1788, he was made a judge of the General Court, and was afterwards appointed professor of law in William and Mary College, succeeding the eminent Chancellor George Wythe.

The duties of judge of the General Court he performed with "as-

siduity and ability, and was considered as decidedly the most learned judge of the court after Mr. Tazewell left it. During that period he was one of the persons appointed to revise the laws, and was very active and useful in the execution of the work." (Mr. Call's sketch.)

He had previously, in 1786, been made one of the commissioners to the famous Annapolis Convention, and, with Edmund Randolph, the Attorney-General of the State, and Mr. James Madison, afterwards President, attended that convention. The address of the convention, drawn by Alexander Hamilton, recommended the holding of another convention of all the States on the second Monday in May, 1787, at Philadelphia, which convention assembled and formulated and proposed the Constitution of the United States to the people of the several States for their ratification.

These several testimonials to his high merits were bestowed upon him, though not a native of Virginia, before he was forty years of age, and followed by the degree of Doctor of Laws, conferred upon him by William and Mary College in 1790, manifest the high esteem in which he was held as a patriot and a lawyer by the people of his adopted commonwealth. In 1803, and while holding the position of professor of law in William and Mary College, he was elected to succeed President Pendleton, upon the death of that eminent jurist, on the bench of the Court of Appeals, where he continued until his resignation, in 1811, to discharge his duties, says Mr. Call, "with distinguished ability." After his resignation, in 1813, President Madison appointed him Judge of the District Court of the United States, which position he held for many years, and resigned by reason of ill health.

In 1791 he had been married a second time. His second wife was the widow of Hill Carter, and a lady of high endowments, and a daughter of Sir Peyton Skipwith. After resigning from the United States Court, he resided for many years in retirement at the home of the distinguished Joseph C. Cabell (who had married a daughter of his second wife), in Nelson county, Virginia, where he died in November, 1827, and was there buried. His widow survived him many years.

This summary of the life of an ancestor, whom the writer never knew, will now be followed by an account of his life-work as a judge and as a judicial writer. Mr. Call says of him that, "As a judge, Mr. Tucker was diligent, prompt, and impartial. He kept a notebook of all that was done in court, in which his own opinions are written at large, but the concurrence or dissent, only, of the other judges, is mentioned. His opinions are generally learned and sound, but

sometimes a little tinctured with technicality, arising, I believe, from his having been entered in a special pleader's office in Bermuda, in order to learn that intricate science, which gave a bias to his mind that he never entirely got rid of."

The late Judge William T. Joynes gave to the late William Green three large volumes of manuscript notes, containing over fifteen hundred pages, in which Judge Tucker did what is stated by Mr. Call in the above extract. These manuscripts were bequeathed by Mr. William Green to his brother, James W. Green, and were by him presented to the writer in 1880. These give evidence of the extraordinary carefulness of Judge Tucker in perpetuating an accurate record of the cases which came before him for judgment during his services as judge of the General Court and while on the Court of Appeals. His opinions, while on the Court of Appeals, are to be found in the last three volumes of Call's Reports, in the four volumes of Henning and Munford, and in the first two volumes of Munford's Reports. It is not within the limits of this sketch to review the cases in the decision of which he took part. Three of them, however, involving important public questions may be briefly referred to.

He delivered an elaborate opinion in the case of *Kamper v. Hawkins* in the General Court,<sup>1</sup> holding that the Constitution of 1776 was the sovereign act of the people of Virginia, and was the supreme law, and that every act of the Legislature or any department of the government in conflict with it was absolutely null and void. This decision was in 1793. It was not the first occasion on which this doctrine had been asserted in Virginia. The remonstrance of the judges of the Court of Appeals in 1788<sup>2</sup> against the action of the Legislature was based on the same doctrine. But each of these cases had a precedent in the celebrated case of the *Commonwealth v. Catton*,<sup>3</sup> in which Chancellor Wythe had, with great boldness and force, asserted the same principle. At all events this last case, decided in 1782, is believed to be the first American case in which the paramount authority of a constitution was established, and the subordination thereto of all governmental acts was made a canon of American law. This now familiar doctrine, followed by Judge Marshall's decision in *Marbury v. Madison*<sup>4</sup> was, therefore, Virginian in its origin; and it is due to the memory of Judge Tucker to record that, as a disciple of Chancellor Wythe, he so heartily co-operated with the other Virginia judges in establishing

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<sup>1</sup> 1 Va. Cases, 20.<sup>2</sup> Id. 98.<sup>3</sup> 4 Call, 5.<sup>4</sup> 1 Cranch. 137.



ST. GEORGE TUCKER.

this canon of constitutional law, which is the greatest American discovery in political science.

While he was on the General Court a question arose in the case of *Woodson v. Randolph*, decided in 1799,<sup>1</sup> in which Judge Tucker dissented from the ruling of the court; and the writer finds his elaborate dissent in one of the note-books already referred to. Congress had enacted that no writing not stamped according to its rules should be admissible in evidence in any court. A majority of the court in this case decided the law of Congress to be constitutional, and that papers not stamped in accordance with the congressional enactment could not be received in evidence. Judge Tucker held that the power of Congress, though unlimited as to revenue, could not make rules of evidence with reference to a State contract sued upon in a State court. This position has been sustained by many cases of more recent date.

In the case of *Turpin v. Lockett*,<sup>2</sup> Judge Tucker, with Judge Roane, sustained the constitutionality of the great act of 1802, by which the glebes of the Episcopal church were ordered to be applied to the poor of the parish wherein they were situated. Chancellor Wythe made the decree appealed from. President Pendleton had written an opinion to reverse, but died before delivering it. This made the six judges who acted equally divided in opinion. The opinion of Judge Tucker was learned and able. The case was decided by a divided court, but was afterwards sustained by the Court of Appeals in *Selden v. Overseers of the Poor*.<sup>3</sup>

But the fame of Judge Tucker depends more on his contributions to juridical literature. While he was professor of law at William and Mary College and a judge of the General Court, he prepared and published, in 1803, five volumes of annotations upon Blackstone's Commentaries, under the title of "Tucker's Blackstone." This work had wide-spread circulation, and was for years a text-book in Virginia and other States. This early candidacy for literary usefulness in jurisprudence, perhaps the earliest in our annals, gave to him the soubriquet of the "American Blackstone," a well-merited title, as well for the original conception as for his ability in giving to the profession an American comment on Blackstone's Commentaries as a nucleus. The original parts of the work were, however, not to be found in his annotations upon the municipal law as defined by Blackstone, but in the appendix to the first book, in which he discusses the political problems of constitutional government, and maintains the republican system of

<sup>1</sup> 2 Va. Cases, 123.

<sup>2</sup> 6 Call, 113.

<sup>3</sup> 11 Leigh, 132.

America against the monarchical and aristocratic system of Great Britain. In this appendix is to be found not only a dissertation upon the principles of government, but the first disquisition upon the character and interpretation of the Federal Constitution, as well as upon its origin and true nature. No writer in America before him had become a commentator upon the Federal Constitution, and it is a tribute to the originality as well as to the ability of the work that all subsequent controversial disquisitions have appealed to him as authority, or have attempted to overthrow his doctrines.

It is not intended to claim by this statement that the speculations of the author have stood the test in all cases of subsequent criticism; but it is claimed that his work of nearly four hundred pages on government and the Constitution, written before the decisions of the great Chief Justice, displays a candor and ability which entitle him to a very high place among American jurists.

A question arose in that day, and is still mooted, whether there is any common law for the government of the United States. In a very elaborate essay he controverts the proposition that there is any such common law; and in this view he has been sustained by the case of *United States v. Worrell*,<sup>1</sup> and by other cases in the Supreme Court of the United States.<sup>2</sup>

On the 30th of November, 1796, Judge Tucker prepared an essay which he inscribed to the General Assembly of Virginia, and of which he thus speaks in a letter to the Speaker of the House of Delegates: "I do myself the honor to enclose you a copy of a disquisition on slavery, with a proposal for the gradual abolition of it in this Commonwealth." He asks that it may be laid before the Legislature, and adds: "My fervent wish is that under their auspices the day may arrive when the blessing of freedom will be inseparable from life in this Commonwealth." The scheme was not for abolition, but for gradual emancipation, and contemplated the ultimate doing away with it, without the evils resulting from radical action.<sup>3</sup>

In note K, in same volume, a short essay on the doctrine of Ex-patriation appears.

It is probable that Judge Tucker had greater facility with his pen than in speech. He wrote with obvious ease, and yet with great care, and thus his views on important political questions sought an avenue to the public mind through the press rather than by speech.

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<sup>1</sup> 2 Dallas, 334.

<sup>2</sup> See *U. S. v. Hudson*, 7 Cr. 32; *Wheaton v. Peters*, 8 Peters 591.

<sup>3</sup> 1 Tucker's Bl. App., p. 31.



Mr. Call says of him, what was no doubt true: "That he was a well-informed scholar; fond of belles-lettres; and wrote very good poetry." Perhaps Mr. Call was a better lawyer than poetical critic, and his affection for Judge Tucker may have made him partial to his poetic productions.

In politics, of which he was very fond, he was a zealous republican, and attached to the Jefferson school, and to the Resolutions and Report of 1798-'9. A perusal of his work on the Constitution will show that he was jealous of centralism, and a firm believer in the reserved powers of the States as essential to the liberty of the citizen.

In private life Judge Tucker was very amiable. He was dignified in manner, but genial and courteous toward those who associated with him. His integrity was strict and scrupulous, and no shadow rests upon his public or private character. He was exemplary as a husband, friend, and step-father (for the children of his first wife were devoted to him, and esteemed him with the affection of children to their own father). He was benevolent and charitable; a good neighbor, a sincere friend, a true patriot; and a man brave and upright. He was much attached to his native isle, but deeply so to his adopted State; and in a book of manuscripts containing his poetical effusions and other matters, in the possession of the writer, he has put the engraving which appears in the REGISTER, with these words under it:

Bermuda me genuit, Virginia fovit ;  
Illi pietate filiali semper devinctus :  
Huic non civis devinctior alter.

At the time that the picture was taken by St. Memmin, the print of which the REGISTER has, he was fifty-five years of age, and wrote the verses with which this sketch closes, which are said to have been very much admired by President John Adams, and which, though not perhaps in rhythm or imagination entitled to rank high among the poems even of his own day, yet are solemn, noble, pure and beautiful in sentiment. They are taken from the book just referred to, and are written in his own hand as they are here given.

#### RESIGNATION.

Days of my youth ! ye have glided away ;  
Locks of my youth ! ye are frosted and gray ;  
Eyes of my youth ! your keen sight is no more ;  
Cheeks of my youth ! ye are furrowed all o'er ;  
Strength of my youth ! all your vigor is gone ;  
Thoughts of my youth ! your gay visions are flown.

Days of my youth ! I wish not your recall;  
Locks of my youth ! I'm content ye shall fall;  
Eyes of my youth ! ye much evil have seen;  
Cheeks of my youth ! bathed in tears have ye been;  
Thoughts of my youth ! ye have led me astray;  
Strength of my youth ! why lament your decay ?

Days of my age ! ye will shortly be past;  
Pains of my age ! but awhile can ye last;  
Joys of my age ! in true wisdom delight;  
Eyes of my age ! be religion your light;  
Thoughts of my age ! dread ye not the cold sod;  
Hopes of my age ! be ye fixed *on your God !*

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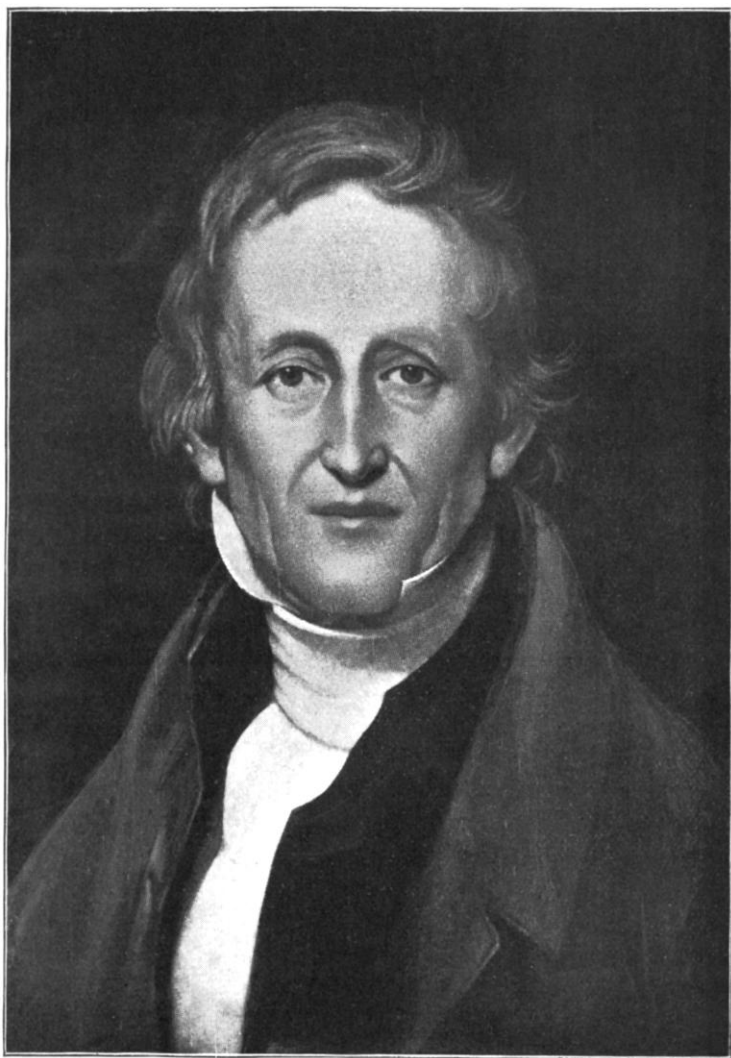
HENRY ST. GEORGE TUCKER, LL. D.

In sketching the career of this eminent man the writer feels conscious that his pen may be guided by the impulses of strong affection, which bind him to the memory of the best and most devoted of fathers; but the task is cheerfully undertaken, for a simple statement of the facts of his life will be his best eulogy.

On the 23d day of September, 1778, St. George Tucker and Frances Bland Randolph, widow of John Randolph of Matoax, were united in wedlock at "Cawsons," the old home of the Blands on the Appomattox river below Petersburg. After their marriage, they resided at Matoax in Chesterfield county, near Petersburg, which Mrs. Tucker held as doweress of her first husband.

At Matoax, on the 29th of December, 1780, Henry St. George Tucker, the first son of this marriage, was born. Three sons of Mrs. Tucker by her first marriage were to be the companions of the subject of this sketch during his boyhood, one of whom was the famous John Randolph of Roanoke. When he was but a week old, Tarleton's raid into Southside Virginia compelled the young mother to flee with her infant and other children into Amelia county, driven over country roads in her chariot by old "Daddy Syphax," of whom honorable mention has already been made; with Colonel Tucker as out-rider and escort for the family, and young Jack Randolph accompanying the party and riding horseback for the first time. After the surrender of Yorktown peace was restored to the family home, and domestic happiness returned.

The mother of the household, if tradition be veracious, was a re-



HENRY ST. GEORGE TUCKER.

markable woman. She was the daughter of Theodorick Bland and Frances his wife (née Bolling), and traced her lineage to William Randolph of Turkey Island, who was also an ancestor of her first husband. Her pictures indicate beauty, but of a style, while not masculine, evincing strong and decided qualities of head and heart. Her first husband was from that branch of the family into which was infused the blood of Pocahontas, but she had none of the royal blood of the aborigines. The celebrated Benjamin Watkins Leigh gives us a glimpse of her in her home, which is happily preserved by Governor Henry A. Wise in his interesting "Seven Decades of the Union." He says that Mr. Leigh, who was a native of Chesterfield, and lived not far from Matoax, said that his education was received from a Scotch parson, who was also a teacher, by the name of Robinson, and who was learned and well educated, and possessed the native ability of his race. He adds "It was the joy of my boyhood to sit at Robinson's knee and listen to his conversations with my father and John Randolph's mother, who lived at Matoax. The world thought that her son spake as never man spake; but *she* could charm a bird out of the tree by the music of her tongue." She died in January, 1788, too soon to have left, perhaps, a very deep impression upon Henry Tucker, but he remembered her and was devoted to her memory. After the death of his wife the elder Judge Tucker left Matoax and returned to his old residence in Williamsburg, where he continued to live until long after his son Henry Tucker was settled in life.

The boy with other members of the family, a full younger brother, the well known Judge N. Beverly Tucker, were educated under their father's care, who was then professor at William and Mary; and afterwards in the old college. He was graduated in the academic degree in about 1798, and in law under his father's teaching about 1801. Of his friends at college, of whom he always spoke with affection, were Benjamin Watkins Leigh, Chapman Johnson, Joseph C. Cabell and others.

His father had in his judicial career been associated with the judges of the General Court, some of whom lived in the western part of the State, and he determined to send his eldest son Henry from the lower country to the Valley of Virginia at Winchester. Henry reached Winchester in the year 1802, just of age. His father started him with a horse, and a negro boy who rode another horse, on his career in life. The writer remembers the negro boy as old "Uncle Bob." He started with an understanding with his father that the latter would

allow him what was necessary for his support for the period of three years; the son kept an accurate account, and called upon the family treasury, in the three years, for the sum of three hundred and seventy-five dollars, which was in addition to what he made. After that he cut loose from dependence on home supplies.

The advancement of Judge Hugh Holmes to the bench, who was a friend of the young barrister, threw most of his business into the latter's hands, and his success from that time was great.

In the year 1806-7 he was elected to the House of Delegates, which gave him acquaintance with the leading men from different parts of the State; but he served but one term.

On the 23d of September, 1806, he married Miss Anne Evelina Hunter, a member of a large and prominent family of that region of the State; a lady fitted in the fullest sense to be the helpmate and companion of her husband in his distinguished career.

The business of that country was large, and, though lawyers' fees in that day were pitifully small, yet the cost of living made the income of the enterprising young lawyer ample for the support of his family. He became engaged in a large amount of important business in connection with the estate of Lord Fairfax, and the rents which grew out of his feudal grants. It was, no doubt, his practice in these cases that gave him so thorough a knowledge of the common law doctrines as to rents, which are so clearly set forth in his chapter upon that subject in his Commentaries, published many years afterwards.

When the war of 1812 broke out, and the British attack on Baltimore and Washington was threatened, Mr. Tucker raised a company of horse, and went to the defence of his country. In that company was the famous lawyer, John R. Cooke, and several others, whose patriotism and learning in the law are more memorable than their military achievements.

When peace returned, in 1815, Mr. Tucker was elected to Congress before he was thirty-five years of age, and entered the House of Representatives in December, 1815. The close of the war brought to the House of Representatives the ablest men in the country. Mr. Clay was Speaker of the House, and Calhoun, Webster, Lowndes, Grosvenour, Gaston, Randolph, Barbour, Tyler, Sheffey, Pinckney and others made a galaxy of ability rarely gathered into that House during any period of its history. Mr. Tucker was made chairman of the Committee on the District of Columbia, a position of prominence which indicated the esteem in which he was held on the very threshold of his

congressional career. He took a very prominent part in the debates of the first session upon the questions which were brought before that body.

The Treaty of Ghent, and the convention for commercial relations connected with it, brought before the House the important constitutional question, how far a treaty stipulation as to commerce, which is within the scope of congressional power, could be valid without the assenting vote of the House of Representatives. He maintained in a speech, marked by fine ability as a debater, that the treaty power in such cases is not effectual until the House assents to its provisions. The House concurred in this view against the strong arguments of Pinckney, Calhoun and others. The question has been the subject of controversy on many later occasions; but the House of Representatives has consistently held the ground that its power as a branch of Congress could not be ousted by the treaty power through the President and Senate.

He took an important part in the discussion of the bank and revenue questions, and in favor of the recharter of the bank as a constitutional question settled by precedent.

In this first Congress great contention arose upon the passage of the new compensation bill for members of Congress. The bill changed the law existing at the commencement of the Congress allowing six dollars per day to members into a salary by the year. Mr. Tucker opposed the bill; the effect of which, when passed, was to give to the members of the then House a salary instead of the per diem compensation. In a speech against the bill, while not opposing the salary for future Congresses, he opposed it because of its retrospective operation. He said that "he could not vote for any bill which gave additional compensation to himself." He then added: "Gentlemen had termed this a squeamish delicacy. He had from his childhood been taught on all occasions of this kind that it was safest to err on the side of delicacy." He not only voted, therefore, against the passage of the bill, but refused to receive the compensation which it fixed; and to this day on the books of the Treasury there is a balance to his credit, which neither he nor his representatives have ever claimed.

He was re-elected to Congress in the spring of 1817, and was made chairman of the Committee on Internal Improvements; which system he advocated in a report from that committee, and in several speeches on the floor. He sent a copy of his report to ex-President Madison, which that venerable statesman complimented very highly, though he

dissented from its views. In reference to all these questions, which arose immediately after the war, there was a departure by many of the Jeffersonian school from the strict canons of construction which had been maintained by the Jeffersonian party in the early period of the Government; and Mr. Tucker was affected in the views which he then took by the general departure of the mass of his party from the ancient doctrines. That he acted with entire conscientiousness in this departure the writer has the most absolute assurance from his knowledge of his character and from the subsequent statements of his father. In this second term of his Congressional career he took part in the debate upon the punishment by the House of Anderson for contempt; and his views were afterwards sanctioned by the decision of the Supreme Court in the case of *Anderson v. Dunn*<sup>1</sup>, although those views have been somewhat disapproved in the late case of *Kilbourn v. Thompson*.<sup>2</sup> At the close of his second term in Congress he declined a re-election and returned to the bar.

In the spring of 1819 he was elected to the Senate of Virginia, where he served for four years. He had expressed during his service in Congress an indisposition for political life; and the writer thinks that his reason for leaving Congress and going to the Senate of Virginia was, that he might have the opportunity consistently with his senatorial duties to practice in the Court of Appeals. This he did to a considerable extent. During his service in the Senate the question of the occupying claimant laws of Kentucky came up for consideration. After the decision of the Supreme Court of the United States in *Green v. Biddle*,<sup>3</sup> which had decided those laws of Kentucky to be unconstitutional, Mr. Clay was sent by Kentucky to make an appeal to the Legislature of Virginia to relieve Kentucky and her citizens from the rigorous operation of that decision. And Mr. Tucker has always spoken with great pleasure of the renewal of relations with that distinguished gentleman on that occasion, and of the splendor of his eloquence in addressing the Legislature. At the close of his term of service he returned to the practice of his profession.

In 1824 Chancellor Carr was elected to the Court of Appeals, and Mr. Tucker was elected judge of the superior courts of chancery for the Winchester and Clarksburg districts, succeeding Chancellor Carr. This position he held for seven years. It is but just to Chancellor Tucker to say that his labors on the bench in this position were effectual in a rapid and successful dispatch of business, almost without parallel.

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<sup>1</sup> 6 Wheaton, 204.<sup>2</sup> 103 U. S. 168.<sup>3</sup> 8 Wheaton, 346.

He had a passion for labor, and was restlessly eager to leave nothing unfinished which he was competent to perform. His active and energetic mind was not content with his judicial duties; and he organized a law school in Winchester in the year 1824, which he conducted during the whole period of his chancellorship. Although Winchester was a provincial town and not very accessible, he gathered large classes from year to year, one year reaching nearly fifty, from all parts of the State and the South. The men of distinction who were taught by him during that period are very numerous, and their lifelong devotion to him gives the highest tribute not only to his ability as a teacher, but to his great power of attaching young men to his person. Judges Lee, Samuels, and Brockenbrough, Governor Wise, Senator Hunter, and a host of others were students at this school. While conducting this school he wrote and had printed for his class "Notes upon Blackstone," which was on a larger scale than the mere annotations of his father in "Tucker's Blackstone." It may well be understood that this double work exacted a large amount of labor. He rose at four o'clock in the morning, wrote his notes for the press before breakfast, and after that devoted the remainder of the morning until court to the study of his cases. He went into court at mid-day, and heard arguments and decided cases. In the afternoon he lectured on his printed notes. At night he studied his court cases, and retired about ten o'clock, after relieving the mental pressure by social intercourse with family and friends, enjoying music and conversation. This routine he kept up the greater part of the year.

In December, 1825, after he had been elected chancellor, the election of senator of the United States to fill the vacancy occasioned by the resignation of Governor James Barbour took place. Singularly, the candidates nominated for the position were Chancellor Tucker, John Randolph, his half-brother, Governor Giles, and John Floyd. Mr. Tucker had been approached in reference to it, and had given positive directions in no event to place him in competition with Mr. Randolph. But some of his friends, thinking Mr. Randolph stood no chance for election, placed Mr. Tucker in nomination on their own responsibility. (It must be remembered that at that time there were no railroads and no telegraph service.) On the first ballot the vote stood, Tucker 65, Randolph 63, Giles 58, and Floyd 40. On the second ballot, Floyd being dropped, the vote stood, Tucker 87, Randolph 79, Giles 60. Giles then being dropped, a new ballot was taken between Tucker and Randolph. Mr. Tucker's friends failed formally to withdraw his name before the ballots were counted, though they



deeply regretted not having done so sooner, on finding that they thus placed him in competition with his brother, which he had peremptorily forbidden. The ballots, however, were counted and the vote stood Randolph 104, Tucker 80, the falling off of Mr. Tucker's vote obviously being due to his known desire not to oppose Mr. Randolph. Mr. Randolph appreciated his fraternal conduct.

In April, 1831, on the reorganization of the Court of Appeals after the Constitution of 1830 had been adopted, he was nominated in the Legislature for president of the Court of Appeals. In opposition to him Judge Francis T. Brooke, who had been president of the court for many years before, and Robert Stanard were nominated for the same high position. Of these three gentlemen, all eminent in their profession, Mr. Tucker was the only nominee from west of the Blue Ridge, and a large majority of the Legislature was from the east of the mountains. The vote stood, Brooke 36, Stanard 33, Tucker 92. This election, in which the two sections of the State must have cast nearly equal votes for Mr. Tucker, gives high evidence of his reputation as a lawyer in all sections of the State. The writer believes that Judge Tucker was nominated for the presidency of the court without any knowledge on his part that it was to be done. He was willing to be elected to the Court of Appeals, but did not aspire to the presidency. After his election under such circumstances, and being brought into association with the other older judges, the youngest man on the bench, and its president, it might have been supposed that his relations to them would have been somewhat strained; but the writer can speak with assurance on this point. The relations between Judge Tucker and his associate judges were of the most intimate, confidential, and affectionate character. After his election to this position, President Jackson substantially proffered to him the office of Attorney-General of the United States. Judge Tucker declined it, saying that, though he highly appreciated the confidence of the President, he could accept no office under the Federal Government after having had the honor of an election to the Court of Appeals of his native State. Mr. Taney, of Maryland, was made Attorney-General, and succeeded Judge Marshall as Chief-Justice a few years thereafter. Judge Tucker remained president of the Court until August, 1841, when, to the surprise of many, he resigned the judgeship to become professor of law at the University of Virginia. Two reasons induced this resignation of the one and acceptance of the other. Judge Tucker, as the writer knows, though he was only sixty years of age and in the vigor of his

faculties, held the view that, as he was judge for life, and in the course of a few years might become impaired in his capacity to perform its duties, when his consciousness of growing infirmity might diminish with such infirmity, it would be wise to anticipate such a state of things by resignation rather than make his tenure of office an incubus upon the court by reason of the infirmities of age. Another reason that induced the change was the attractiveness to him of teaching the law to young men. Besides, the Board of Visitors, of which Mr. Chapman Johnson was then rector, urged it upon him as a patriotic duty to accept the professorship because of the blow that had been dealt to the prosperity of the institution by the unhappy assassination of Professor Davis, of the law department, in 1840. It was thought that Judge Tucker's appointment would restore confidence in the University, which had been much shaken by this sad calamity. His retirement from the bench gave rise to the expression of great regret on the part of the members of the court, and of their confidence and esteem for him. He went to the University in September, 1841, and entered with pleasure akin to enthusiasm upon his professorial duties. The writer sadly remembers that on the 4th day of October, 1841, Professor Tucker was the victim of a slight attack of paralysis, from which, though temporarily relieved, he never recovered. The writer knows it was the beginning of the end. During the latter part of the year the effects of this attack were quite marked, and, as the writer knows, who watched him with filial devotion, his capacity for labor diminished, until he resigned the position at the end of the session of 1845 on account of ill health. He had been desirous of doing so previously, but his colleagues and the Board insisted upon his remaining.

The second year of his professorship he was elected Chairman of the Faculty, and immediately instituted several reforms, which upon his recommendation were adopted, and continue until this day. One was that in the examination of any candidates for the honors of the University they should attach to their examination papers a certificate on honor that they had received no assistance of any kind. This rule of honor, adopted in July, 1842, on the motion of Mr. Tucker, has been adopted in other institutions in Virginia and elsewhere,—a provision which has elevated the standard of honor among the students wherever it has been adopted. He also proposed to the Board of Visitors the repeal of the laws in reference to the wearing of a uniform, and as to early rising, making it sufficient for the student to be ready for breakfast. The doing away with these rules, which had been a source of

trouble to the professors and of unnecessary annoyance to the students, had a very salutary effect.

The School of Law suffered under Judge Tucker's administration in numbers, by reason of the falling off of the total number of students, owing to the tragic death of Professor Davis; and no doubt the decline in his health in succeeding years operated in the same direction. And yet during the four years of his service the number of law students was twenty-five per cent. of the whole number of students, which was larger than the percentage during many years after he resigned from the school. Professor Davis had held to "Thomas' Coke" as the text-book on real property. For this Judge Tucker had substituted "Tucker's Commentaries," which was the expansion of the notes which he printed for the use of his first class while he was chancellor in Winchester.

It is touching to read the resolutions of his class at the end of the session of 1844, when his health had been greatly impaired, in which they speak of him as professor and friend in terms of the highest appreciation.

The resolutions of the Faculty of the University upon his resignation, in 1845, are worthy of being inserted here as a tribute of their esteem for him as a man and professor. They say: "We entertain a deep conviction of the distinguished services which have been rendered by Judge Tucker to his native State during his long and eminently successful career as a jurist and able teacher of his favorite science. We refer with pleasure to the able, dignified, and impartial manner in which his duties as professor of law have been uniformly discharged, and we shall cherish with feelings of gratification the recollection of his kind, courteous, and conciliatory deportment, by which his intercourse with his colleagues has ever been characterized."

His first class at the University was a brilliant one. Among its members were Judge Wm. J. Robertson and Judge E. C. Burks, afterwards on the Court of Appeals bench; Edmund Randolph, M. R. H. Garnett, the late Senator Barbour, John Scott of Fauquier, George W. Brent of Alexandria, William Watts of Roanoke, Wm. B. Stanard, H. Coulter Cabell, and many others.

After Judge Tucker left the University in 1845 in shattered health, he returned to Winchester, where his professional life had been passed; and died there on the 28th of August, 1848, universally lamented by the people of Virginia, whose faithful servant he had so long been.

A review of Judge Tucker's career as a judge of the Court of Ap-

peals is not within the limits prescribed for this sketch; but some general views may be taken of it, in which the readers of this sketch will be interested.

In answer to a request, which the writer made of him to say what he considered the best of the opinions of Judge Tucker, Judge Burks answered, saying "Where all are excellent, a selection is difficult. I venture, however, to name the following: *Selden v. Overseers of the Poor*, decided while he was chancellor, a copy of his opinion in which is found in the appendix to the first volume of his Commentaries, and afterwards affirmed by the Court of Appeals;<sup>1</sup> *Gallego v. Attorney-General*,<sup>2</sup> *Watts v. Kinney*,<sup>3</sup> *Conrad v. Harrison*,<sup>4</sup> *Tenent v. Patton*,<sup>5</sup> *Williamson v. Beckham*,<sup>6</sup> *Morrow v. Peyton*,<sup>7</sup> *Skipwith v. Cunningham*,<sup>8</sup> *Douglas v. Fagg*,<sup>9</sup> *McClung v. Bierne*,<sup>10</sup> *Pierce v. Trigg*,<sup>11</sup> *Tunstall v. Pollard*,<sup>12</sup> *Tuckahoe Canal Co. v. Tuckahoe Railroad Co.*,<sup>13</sup> *Powell v. White*,<sup>14</sup> *Ross v. Milne*."<sup>15</sup>

The opinion of Chancellor Tucker in *Selden v. Overseers of the Poor* and of President Tucker in *Gallego v. The Attorney-General*, bearing upon the question of charities and the rights of the church to hold property in Virginia, followed by *Janney v. Latane*,<sup>16</sup> and by *The Literary Fund v. Dawson*,<sup>17</sup> upon the broad views taken by President Tucker, led to the Act of 1841-'2, and others embodied in the Code of 1850, and re-codified in the Code of 1887, sections 1319 to 1403, which, recognizing the validity of the decision of Judge Tucker in *Gallego v. Attorney General*, have defined the legal holding of church property in Virginia according to its present limits. And the same principle was put into the Constitution of 1850 and embodied in the present Constitution against the incorporation of any church or religious denomination, and securing the title to church property to an extent to be limited by law. The leadership of President Tucker in this settlement of ecclesiastical polity in Virginia has been recognized in a number of cases, and notably by Judge Moncure in the case of *Seaborn v. Seaborn*,<sup>18</sup> in this language: "The opinion of President Tucker in that case, in which the policy of the State was so ably vindicated, has since met with general, if not universal approval, which seems to be still unabated."

<sup>1</sup> 11 Leigh, 132.<sup>2</sup> 3 Leigh, 450.<sup>3</sup> Id., 270.<sup>4</sup> Id., 532.<sup>5</sup> 6 Leigh, 196.<sup>6</sup> 8 Leigh, 20.<sup>7</sup> Id., 54.<sup>8</sup> Id., 271.<sup>9</sup> Id., 588.<sup>10</sup> 10 Leigh, 410.<sup>11</sup> Id., 423.<sup>12</sup> 11 Leigh, 1.<sup>13</sup> 11 Leigh, 42.<sup>14</sup> Id., 309.<sup>15</sup> 12 Leigh, 204.<sup>16</sup> 4 Leigh, 327.<sup>17</sup> 10 Leigh, 153.<sup>18</sup> 15 Gratt., 423.

In *Watts v. Kinney* and *Powell v. White* he discussed the rights of sureties who have paid off the debts of the principal. In the last of these cases President Tucker vindicates the Virginia practice in such cases against the opinion of Lord Eldon in *Copis v. Middleton*.<sup>1</sup> As to these opinions the American annotators say in *Deering v. Earl of Winchelsea*<sup>2</sup> "that the Virginia practice was vindicated against the authority of Lord Eldon with distinguished and convincing ability."

The decision in the case of *Tuckahoe Canal v. Tuckahoe Railroad* followed the decision of the Supreme Court in the Charles River Bridge case, and discussed the questions involved upon broad and comprehensive grounds.

In the case of the *J. R. K. Co. v. Turner*<sup>3</sup> President Tucker delivered an opinion on what was the proper course to be pursued in the condemnation of land for public improvements, in respect to the damage to the residue of the tract, and the nature of the peculiar advantages to the owner, which are to be allowed against such damages. These views, no doubt, suggested the form of the present statute in Virginia on that subject.

In addition to the cases referred to by Judge Burks, reference may be made to the case of *Rider v. Union Co.*<sup>4</sup> as illustrative of the character of Judge Tucker's decisions. In that case the court decided on the effect of the expiration of a charter on the obligations to and by a defunct corporation. The court was compelled to hold to the common law rule that such obligations were extinguished by dissolution or expiration. But Judge Tucker pointed out the gross injustice of this, and strongly recommended legislation, which recommendation was followed by the Act, the substance of which is found in the Code, section 1153. An interesting point in this matter is that the legislation so recommended preceded by nearly twenty years the decision of the Supreme Court in *Bacon v. Robertson*,<sup>5</sup> and in *Lum v. Robertson*,<sup>6</sup> which were in substantial accordance with the above Act of Virginia.

This must suffice as a reference to the opinions of Judge Tucker while on the bench of the Court of Appeals. Judge Burks further says in connection with his reference to these cases: "Indeed all of Judge Tucker's judicial opinions are worthy of special notice, and if teaching by the case system should ever prevail in the law schools of Virginia, many of his opinions and decisions should be among the selected cases."

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<sup>1</sup> 1 T. & R. 229.

<sup>2</sup> 1 W. & T. Ldg. Cas. 108-9.

<sup>3</sup> 9 Leigh, 313.

<sup>4</sup> 7 Leigh, 175.

<sup>5</sup> 18 How. 480.

<sup>6</sup> 6 Wall. 277.

As an author Judge Tucker expanded the notes which he originally printed for the use of his Winchester class into two volumes, upon the first three books of Blackstone. It was adopted as a text-book by him at the University of Virginia, and was, so to speak, the *vade mecum* of the bar of Virginia until the adoption of the Code of 1850, and the decisions of courts after the last edition, put it out of date. It was recognized by the bar of Virginia, and in many of the Southern States, as the most valuable text-book for students and lawyers then in existence. Few books have ever been written which compacted so much law into the same space, with so much clearness, succinctness, and fullness of illustration.

He wrote several other books as text-books, one upon Natural Law and another upon the Formation of the Constitution, which are now out of print, but were used by him at the University.

In the midst of all his arduous labors on the bench and as a juridical writer his active mind found time to range occasionally into the field of literary authorship. His contributions in this direction to the *Southern Literary Messenger* will be referred to hereafter.

Judge Tucker was public-spirited, and took an active part in and subscribed largely to the Winchester and Potomac Railroad as early as 1831, before there was a mile of railroad in the State. He was elected President of the Virginia Historical Society, made vacant by the death of Chief-Justice Marshall. In all schemes which looked to the development of the material, moral, or intellectual promotion of his people, he was always zealous, and contributed his influence and means to these ends. The degree of Doctor of Laws was conferred on him in 1837 by his Alma Mater, the University of William and Mary.

The writer feels embarrassed in attempting to delineate the character of the subject of this sketch. Despite this embarrassment he will present a picture of his father as he knew him.

His mind was quick, acute and strong, fertile in resources and suggestive of the various views that might be taken of any subject under discussion. He sought to reach the truth, and was anxious and eager to search for it through every avenue which could possibly lead to it. He was never content until he could rest satisfied that he had found all which could aid him in reaching the goal of truth. His nature was too earnest and honest to be consciously misled by sophistry, and his keenly analytic mind seldom failed to detect a fallacy by which he might be led into error. While yielding reluctantly to the results which technical

principles required, he never did so unless it was imperatively demanded, where the real justice of a case could be reached by his judgment. And, as in the case of *Rider v. Union Co.*, *supra*, where technical rules demanded a decision in the face of justice, he was ready to suggest a change in the positive law in order that justice might have its course. His perceptions were so clear, his apprehension so vivid, his comprehension so large and enlightened, that his reasoning illumined with the force of judicial genius the subjects he discussed. He always sought to base his decisions on some principle of moral right which would commend them to the forum of ethics, even if contrary to the narrow views of merely technical law. His style, dictated by sincerity of conviction, was perspicuous to the logician and attractive to the literary critic. The dullness of the theme was always relieved by the vivacity which he brought to its discussion. He united rare perspicacity of thought with a luminous perspicuity of diction, which received the highest praise and furnish examples for judicial opinions.

Judge Tucker's private character in all the relations of life was a model of integrity, honor, charity, and manners. He was "*Le chevalier sans peur et sans reproche*." His charities and benevolences to the widow and the orphan, to the poor and friendless, though unostentatious, are held in remembrance by the descendants of numberless beneficiaries. While not prodigal in expenditures, his home was the seat of the most liberal hospitality, and his hand was ever open to the appeal of charity.

His manners were of the highest type of the old *regime*, though free from the rigid formality and repulsive ceremony which sometimes prevailed in the olden time. Genial and ready of approach to all, he yet had an innate dignity which checked intrusiveness and impertinence, but gave great charm to his free and cordial intercourse in general society and in his own home. His presence shed the genial glow of loving sympathy with the distressed, or diffused its warm sunlight in the circle of social enjoyment. With his talent for easy versification, his liberal classical culture, and his love for literature, both prose and poetry, he charmed by his conversational powers, and sometimes by readings from his favorite authors or by playful and sentimental verses of his own.

He had a happy facility to unbend the bow of his highly strung intellect, and to relieve his intense mental labors by diversions in the field of literature, or in the society of his family and friends. Specimens of his lighter poems might be given; as a "*jeu d'esprit*" to his

brother on the bench, Judge Cabell, poetical letters between him and his brilliant friend, B. W. Leigh, his charming kinsman, Prof George Tucker, etc. But the writer contents himself with the following satire on the politics of his day, not inapplicable to a later era :

“Hence, if you have a son, I would advise,  
Lest his fair prospects you perchance may spoil ;  
If you would have him in the State to rise,  
Instead of Grotius let him study Hoyle.  
And if his native genius should betray  
A turn for petty tricks, indulge the bent ;  
It may do service at some future day.  
A dexterous cut may rule a great event ;  
And a stocked pack may make a President !”

It is a heritage to his children and a delightful memory to his friends to recall his home, where virtue, honor and culture found illustration and example in the person of the best of men ; where calumny, scandal and vice were excluded ; where every Christian virtue, and every pure and honorable and elevating influence, were always welcome guests. His home life in Winchester, in Richmond, at Woodbury, his country place in Jefferson county, and at the University, was the same in all these moral essentials, despite the change of locality ; and after the lapse of half a century many yet survive who will attest the truth of this picture, drawn by the unskilled hand of filial reverence and love.

The writer is not content to let his own delineation stand alone, but will close this too prolonged sketch with the testimony of impartial witnesses to the public and private character of Judge Tucker.

Mr. John R. Thompson, the editor of the *Southern Literary Messenger*, thus speaks of Judge Tucker after his death in 1848 :

“We do not propose to write the obituary of the late Henry St. George Tucker That affecting task has been already worthily performed. But we desire to say that in his removal from the scene of his earthly labors, society, the Commonwealth, the law, has lost a brilliant ornament. Of social qualities the most endearing and remarkable, he has filled with honor the first offices of his native State, and illustrated the annals of her jurisprudence. And while he went down to the grave, the victim of a painful and lingering malady, attended with the touching regard of his friends, the public at large feels the loss of a jurist, whose ermine had indeed been laid aside for some years, but whose usefulness had indeed been most eminently displayed in the lecture-room of the University. As for us who had received his instruction and enjoyed the elegant hospitality of his mansion, we could not but be most painfully impressed.

“As a literary man Judge Tucker was deservedly esteemed, though he never aspired to the honors of the class ; and indulged a gift of easy versification only



as a means of brightening intercourse in the society circle. His productions were merely *vers de société*; yet the *Messenger* contains many articles from his pen, both in prose and poetry, that might well deserve a place among the best selections of American literature."

Judge William J. Robertson, formerly of the Court of Appeals, speaks thus of Judge Tucker as teacher and author:

"I was a student in the law school of the University of Virginia in the session of 1841-'2, when Judge Henry St. George Tucker was the professor of law. I regarded him, as I still do, as an admirable teacher in all respects. The regard which I felt for him personally amounted to veneration, and I entertained the highest opinion of his ability and merits as a teacher of law. This opinion and these feelings have been in no degree changed in the time that has elapsed since I was a member of his class. He possessed the rare faculty of explaining in clear language the most abstruse subjects, and the affectionate respect with which he was regarded by each member of his class caused the relation between teacher and pupil to be as productive of good to the pupil as it was possible to make it."

"His chief text-book was "Tucker's Commentaries," a work (founded on Blackstone) which had been prepared by himself, and which was admirably adapted to the then condition of our law.

"Valuable as later Virginia works unquestionably are, I have always wished that some competent person would prepare and publish an edition of it adapted to the present state of our law."

Judge Burks, who was a member of the law class at the University of Virginia in 1841-'2, and who was himself a distinguished member of the Court of Appeals from 1877 to 1883, thus speaks of the character of Judge Tucker's decisions:

"While he had due regard to the doctrine *stare decisis*, he was not so hampered by precedents as to lose sight of the principles upon which they were founded. He regarded these as the fountains, and always went back to them. He was thoroughly imbued with the spirit of justice and equity, and strove to embody it in his judgments, even amid restricting technical rules, which he was not wholly at liberty to disregard. He was scholarly, and had a great felicity of expression. He was never dull; always bright; and the dryest, most unattractive legal question glowed and sparkled under the fire of his genius. He excelled most judges in the quality of clearness; he was never obscure. You might (though seldom) disagree with him; but you would never throw down in disgust the volume containing his opinion and say, 'What does this judge mean? I do not understand him.' Even the uninitiated layman of ordinary intelligence could understand him.

"In short, in my opinion, Judge Tucker stands first in the bright catalogue of Virginia's distinguished jurists; *inter pares facile princeps*.

"He was a model law teacher, exhibiting in the professorial chair the qualities that so distinguished him on the bench. His lectures on every subject in the wide domain of jurisprudence were most attractive. His explanations were always lucid; his illustrations apt and impressive; and his reasoning convincing. In the lecture-room he was gentle in manner, and his intercourse outside with his pupils was affectionate and parental.

"To sum up, he was, in my estimation, a great judge, a model law teacher, and one of the best of men. Strangers may think that I have spoken in somewhat extravagant terms, but those who knew Judge Tucker as I did will not agree with them."

The Hon. James Keith, President of the present Court of Appeals, has given the writer the following estimate of Judge Tucker, whom he never knew personally:

"It is only as a judge and author that Henry St. George Tucker is known to me, but from my earliest acquaintance with Leigh's Reports, those great repositories of the jurisprudence of this State, I have studied his opinions with an ever-increasing interest. That he was profoundly versed in the "lawless science" of the common law and a master of its principles, his writings as well as his judgments attest; but it is as a great equity judge or chancellor that I have chiefly admired him. His mind seems to have been saturated with those lofty and refined principles of justice which have come down to us from the civil law; and not only are they applied with consummate skill to the disposition of causes which came under review before him, but his treatment of them proves that his knowledge derived from books was completely digested and thoroughly assimilated. His opinions afford conclusive evidence not only of his industry, learning, and love of justice, all of which are conspicuous, but they are accompanied by an elevation of sentiment and an elegance of expression which make them models of judicial style.

"There is another thought or sentiment suggested by the study of President Tucker's opinions, which it is difficult to put into words. There is certainly in them nothing that savors of weakness or infirmity, and yet I have often felt that there was transfused through them a certain subtle, intangible element which serves to tone and soften his judgments without diminishing their force. They seem to disclose in their author a benignity of disposition, a benevolence of mind, which I cannot more aptly express than by calling it the *spirit of equity*.

"Finally, the study of his opinions leaves one strongly imbued with the feeling that he was not only a learned and just judge, but a man whom it would have been a great pleasure to know, and whose friendship it would have been a great privilege to enjoy."

His brother, Judge Beverly Tucker, professor of law in the College of William and Mary, has placed an epitaph upon his tomb, which is as remarkable for its literary merit as for its beautiful delineation of the character of his dead brother, and will serve as an appropriate close of this article. It is in the following language:

"In memory of Henry St. George Tucker, President of the Court of Appeals."

"Learned without pedantry; grave without austerity; cheerful without frivolity; gentle without weakness; meek but unbending; rigid in morals, yet indulgent to all faults but his own."

"The elements of goodness were in him combined and harmonized in a certain

majestic plainness of sense and honor, which offended no man's self-love, and commanded the respect, confidence and affection of all."

"A faithful husband ; a kind and prudent father ; a gentle master ; a steadfast friend ; an able and diligent public officer :

"He lived without reproach,  
And died without an enemy."

J. RANDOLPH TUCKER.

*Washington and Lee University,  
Lexington, Va.*